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ALJ

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42051

WISCONSIN POWER AND LIGHT COMPANY
v.
UNION PACIFIC RAILROAD COMPANY

Decided: September 19, 2000

On September 11, 2000, Wisconsin Power and Light Company (Complainant) filed Complainant's Third Motion to Compel Production of Documents. The Board's Decision served August 29, 2000, fixed the due-date of rebuttal statements at September 28, 2000, and thus made the usual 20-day reply period impossible to observe. The motion must be treated with expedition.

Complainant's motion addresses a single document production request alleged to be unsatisfied, REQUEST FOR PRODUCTION NO. 15 of Complainant's first set of discovery requests served on Union Pacific Railroad Company (Defendant) January 14, 2000. It requests production of 21 identified and described crew data documents and sets of documents for each year or partial year 1997 to the present.

Complainant's motion does not attack Defendant's response to that request except as to documents of the year 2000. It alleges that Defendant's response for 2000 was selective, incomplete, and prejudicial. Complainant now seeks an order compelling Defendant to produce all the 2000 crew data documents named in the request.

On September 13, 2000, Defendant filed its reply, resisting Complainant's motion on two grounds, which will be considered separately:

1. Neither party is relying on year 2000 crew wage data for variable cost calculations; and

2. Reopening discovery at this stage of the proceeding would be improper.

By letter dated September 16, 2000, Complainant seeks to "clarify several points raised" in Defendant's September 13 reply. Call it what you will, that letter is a reply to a reply,

prohibited by 49 CFR § 1104.13(c). It has not been considered in the disposition of Complainant's motion.

Year 2000 Wage Data:

Complainant acknowledges in its motion (at p. 3), that Defendant's cost consultants' use of 2000 crew wage data was limited to corroborating previous testimony that two crews worked the trains between Butler and Edgewater--a point Complainant has conceded. There has been no allegation that Defendant's consultants used 2000 wage data to calculate "[Defendant's] costs for crews," or for any other variable cost calculations. Rather, both parties are relying on 1999 data produced in discovery to calculate variable costs.

Complainant's assertion (motion at p. 6) that Defendant itself raised the year 2000 crew data as an issue and did so for the first time in an August 14 reply is not supported. It was Complainant's own witness who asserted on opening that changed operations reduced the number of crews in 2000 between Butler and Edgewater, and that this change justified his downward adjustment to Defendant's 1999 crew wages. Crowley Opening VS at pp. 20, 21. Defendant responded that the number of Butler-to-Edgewater crews per round trip in 2000 was virtually unchanged. See Kent/Fisher Reply VS at p. 37. Defendant's cost consultants cited year 2000 data that had become available relating to those particular crews, and provided that data to Complainant. It follows that Defendant is not withholding any discoverable information upon which it has relied.

Complainant has no legitimate basis for now demanding year 2000 crew wage data for Defendant's entire system. Indeed, Complainant submitted two rounds of variable-cost evidence using the same 1999 crew data that Defendant used, without requesting, either informally or through a supplemental discovery request, more recent 2000 data. Discovery in this proceeding ended on March 29, 2000. Complainant must not be permitted to delay matters on the ground that new data have become available since discovery closed, especially when such data might serve no discernible useful purpose.

Reopening Discovery:

Complainant argues that the Board's rule on supplemental discovery responses, 49 CFR § 1114.29, requires that Defendant produce 2000 crew wage information for all crew districts along its route. Motion at p. 4. I do not read § 1114.29 that way. I read it as requiring a party to supplement a discovery response only in certain restricted circumstances, none of which I can find here. A party is required to supplement a discovery response when the identity or location of knowledgeable witnesses change, 49 CFR § 1114.29(a)(1) & (2), or when a party learns that a prior response is incorrect, id., § 1114.29(b). Neither provision has any applicability here.

Section 1114.29(c) does state that a party may submit new requests for supplementation of prior requests, but only "at any time prior to the hearing or the submission of verified statements...." Id., § 1114.29(c) (emphasis added). Here, both parties have submitted two rounds of verified statements. Complainant's motion, which has the effect of attempting to resume discovery, follows the submission of verified statements, making the rule inapplicable.

It is a commonplace that all litigation must have an end, and that observation applies equally to discovery. There has been a liberal use of that device in this proceeding, and Complainant's attempt at prolonging it must fail because (1) it seeks nothing that could be used to counter anything injected into the case by Defendant and (2) it is too late.

For all the reasons stated, Complainant's motion described above is denied.

This decision is effective on the service date.

By the Board, Joseph R. Nacy, Administrative Law Judge.

Vernon A. Williams
Secretary